PETER SELVARAJ & ANOR

v.

CHENG BEE TEIK & ORS

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-128-2002]
28 AUGUST 2002

ROAD TRAFFIC: *Negligence - Collision between van and two motorcycles - Motorcycles racing against each other - Van keeping towards centre of road when collision occurred - Whether equally negligent*

DAMAGES: *Fatal accident - Dependency - Future loss - Deduction for contingencies and vicissitudes of life - Whether a matter of discretion - Whether deduction not necessarily be 1/3*

This was an appeal against the decision of the learned Sessions Judge holding, in a claim for damages and dependency, that the first defendant was totally liable for an accident that took place between the van he was driving and the motorcycles ridden by the first and third plaintiffs respectively. It was not in dispute that, in so holding against the first defendant, the learned Sessions Judge had subscribed to the plaintiffs' version that the first defendant had encroached onto the path of the motorcycles whilst overtaking a certain motor lorry. The defendants gave contrary evidence, contending in effect that there was no such motor lorry and that the motorcycles were at the material racing against each other. Before the present court, questions arose as to whether the learned Sessions Judge's finding on liability was sustainable on the evidence, and in any case, whether the awards that she made, particularly those that relate to loss of earnings and cost of prosthesis, were justified.

Held:

[1] The learned Sessions Judge had erred in finding that there was a lorry present at the place of the accident. Surely if the first defendant was about to overtake the lorry he must have encroached a substantial distance into the plaintiff's path. There was however no such evidence, as only the front right side of the van had gone across the central double lines. The possibility of a lorry being present which the first defendant is alleged to have overtaken cannot be accepted. (pp 776 c-d)

[2] The learned Sessions Judge had erred when she failed to give due weight to the mark 'I' on the sketch plan denoted as 'kesan tyre'. On the evidence, the impact between the motorcycles and the van was at point 'I' which is clearly into the first defendant's path. The failure of the learned Sessions Judge to consider this vital piece of evidence has resulted in a miscarriage of justice to the defendants. (pp 776 h & 777 a)

[3] It is obvious that the riders of the motorcycles had encroached into the first defendant's path. The first defendant too could not have been driving one foot from the left edge as he testified. He too must have been keeping to the centre when the collision occurred. Both the riders of the motorcycles and the first defendant were therefore equally liable. (p 777 b)

[4] The pillion rider would no doubt succeed on a 100%. However the court must grant the defendants an order for indemnity with costs against the first plaintiff in respect of the second plaintiff's claim. (p 777 c)

[5] As for the total award made for future loss, the court has a right to deduct a sum for contingencies and other vicissitudes of life and also taking into account the accelerated payment. However, since it is open to each court to consider its own special features, and further that, since there was no basis nor explanation for a standard 1/3 deduction, this court would not be transgressing the principle of stare decisis if it were to exercise its discretion based on the background of the plaintiffs herein, and make a deduction of 1/4 instead of 1/3 of the total award. (pp 777 h & 778 a)

[5a] The first plaintiff's cross appeal is partially allowed by awarding him actual loss of RM1321.75 per month for three months, instead of RM930 per month awarded by the court below. And, applying the principle laid out in *Takong Tabari v. Government of Sarawak & Ors and Another Appeal*, a 1/4 deduction is made from the total award made for future cost of prosthesis. (p 778 b)

[6] As for the second plaintiff's claim, upon the evidence of the grandmother that the deceased had given her RM500 a month, the assessment of the lower court at RM300 a month is set aside and an award of RM500 a month is instead made. Also, since there was evidence that he was then earning RM1,660.80, no deduction ought to be made on this sum. However the years of purchase is reduced from 16 years to five years, as the grandmother is already 66 years old. (p 778 e-g)

[7] On the facts, it is reasonable that the deceased third plaintiff had given the father RM300 a month. The award of RM300 made by the lower court is thus accepted. However, considering the vicissitudes of life, the years of purchase ought to be reduced from 16 years to 10 years. (p 779 b-c)

[Appeal partly allowed; order accordingly.]

Case(s) referred to:

Chan Chin Ming & Anor v. Lim Yok Eng [1994] 3 CLJ 687 SC ***(foll)***

Takong Tabari v. Government of Sarawak & Ors And Another Appeal [1998] 4 CLJ 589 CA ***(refd)***

For the appellants/defendants - Rajendran (Cik Shamila); M/s Dass Jainab & Assoc
For the respondents/plantiffs - Rhina Bhar; M/s Rhina Bhar & Assoc

Reported by WA Sharif

JUDGMENT

RK Nathan J:

The 1st plaintiff was the rider of motorcycle PDK 3393 at all material times and the 2nd plaintiff is the grandmother and dependant of the deceased pillion rider of motorcycle PDK 3393. The 3rd plaintiff is the father and dependant of the deceased rider of motorcycle PDF 8839 (Mua Yoo Sern). The 1st and 2nd defendants respectively were the driver and owner of motorvan PAY 7446.

Plaintiffs' Case

On 23 December 1998 at about 11.45pm the 1st plaintiff with his pillion and Mua were riding their respective motorcycles along Jalan Paya Terubong proceeding from the direction of Ayer Itam towards the direction of Relau. The 1st defendant was then proceeding from the opposite direction. The plaintiffs' pleaded case is that the 1st defendant overtook a vehicle ahead of him and encroached into the plaintiffs' path and collided into both the motorcycles.

Defendants' Case

It is the pleaded case of the defence that the collision occurred as a result of both the motorcyclists encroaching into the 1st defendant's path, from the opposite direction whilst racing with each other and thereby crossing over a double line in the center of the road. In their counterclaim both the defendants claimed relief from the 1st plaintiff in the event the 2nd plaintiff succeeded in her claim. There is also a claim for a set-off.

Findings Of The Court

Having heard the evidence of the witnesses the learned Sessions Judge found the 1st defendant totally liable for the accident and made various awards for the parties. Dissatisfied with the said decision the defendants appealed against

liability and quantum. The plaintiffs filed a notice of motion which I heard on the day fixed for the hearing of the appeal. The notice of motion was for extension of time to file the Notice of Cross Appeal against the award of damages only. Since the defendants had no objections I granted order in terms. Parties then intimated to the court that they were prepared to proceed both with the appeal and the Cross Appeal notwithstanding the fact that the Notice of Cross Appeal had not been filed.

The 1st plaintiff testified that he was proceeding about 2-3 feet from the central double white lines at a speed of between 60-70 k.p.h. The sketch plan shows a left hand bend for the motorcyclists. There was not much traffic on that stretch of the road at that time. The 1st plaintiff's evidence was that the scene of the accident was dark. Although there was a street light, it was some distance away from the scene of the accident. The reason he had kept to the centre of the road was because he could not see the central lines if he had kept to the left edge of the road. The light from his motorcycle was not bright enough. All of a sudden he noticed about 50-60 feet away a lorry approaching from the opposite direction. However when he was about 20-30 feet away he noticed the defendants' van attempting to overtake the lorry. He does not say if he was 20-30 feet from the lorry or from the defendant's van when the van was attempting to overtake the lorry. His evidence was that when he saw the van attempting to overtake, he heard the sound of brakes of the van. He then collided into the right side of the van. He however maintained that prior to the collision he did not encroach into the 1st defendant's half of the road.

The investigating officer testified that the mark "I" on the sketch plan was 0.90 meters into the defendant's half of the road from the central double white lines. This mark "I" he said was caused by the tyre of the van after it had punctured. It was not the commencement of a brake mark. The agreed sketch plan showed the mark "I" which ended at the right rear wheel of the van, to be 8.40 meters in length.

The 1st defendant's evidence was that it being Christmas period he was ferrying nine passengers in his van as they had intended to go carolling at Ayer Itam. There was another van driven by the priest named Jega and that van was ahead of his van. As he reached a right hand bend he noticed two motorcycles approaching him from the opposite direction at great speed. The motorcycles then collided into the front and the rear right tyres of his van respectively causing both tyres to sustain punctures. As soon as both tyres were punctured, he was unable to control the van and it began to swerve to the right. He confirmed that when he gave a statement to the investigating officer he did not mention that there was a van proceeding ahead of him and in the same direction. The first time he saw both the motorcycles they were about the

distance of two cars. The van ahead of him was also that distance from him. Both his van and the van ahead of him were proceeding about 1' from their left edge of the road. The first motorcycle collided into his front right tyre whilst the second motorcycle collided into his rear right tyre. Both the motorcyclists were speeding and his speed at that time was about 60 k.p.h.

The next witness called by the defence was a passenger in the 1st defendant's van who was sitting in the middle of the van. His evidence-in-chief was similar to that of the 1st defendant except that he said that the van in front of them was about the distance of five cars away. At the material time he was talking to the front seat passenger of the van. There were three rows of seats for passengers and he was seated in the front row. It was his evidence that both the motorcyclists were racing with each other. He testified that both the motorcycles fell, skidded and then collided with the van with one motorcycle colliding into the front and the other to the rear of his van. He denied a suggestion that the van had encroached into the plaintiffs' path.

The third witness for the defence was the priest who was driving the van proceeding ahead of the 1st defendant's van. His evidence was that the two motorcyclists were racing and as he came out of the right hand bend the two motorcyclists just missed him. He did not see the collision between the motorcyclists and the van following him. He testified that both the vans with passengers were on their way to a house to carol. Under cross-examination he confirmed that his speed at that time was between 60-70 k.p.h. and that he was travelling about 3-4' from his left edge of the road. He was emphatic that there was no lorry behind him because when the motorcyclists missed him he looked to the rear and saw the motorcycles near the centre line.

The learned Sessions Judge found the 1st defendant totally liable because she held that there was no other van ahead of the 1st defendant. She came to this conclusion because the 1st defendant did not mention the existence of the van that he was following in his police report and because the investigating officer was not notified of the existence of this van. Having thus dismissed the presence of this van at the scene, the Sessions Judge went on to hold that the court was entitled to presume that the said van was indeed the motorlorry that the 1st plaintiff said the 1st defendant was attempting to overtake.

To my mind, the learned Sessions Judge erred in making such an assumption. It is necessary to see if the second van's presence was of any significance to this case. All that the driver of that van testified to was that the two motorcyclists were racing and when they neared his van he looked to the rear and saw them near the centre of the road. He did not see the accident. In fact neither counsel asked the defendant why he did not mention the existence of the other van in his police report nor did either counsel ask the driver of the

other van why he did not lodge a police report. He might well have given a valid reason. Besides the second van driver's evidence could not have materially affected either party's case. However the learned Sessions Judge very conveniently substituted the motorlorry for this van. It must be noted that there was no observation made that any of the defence witness was prevaricating. Whilst the learned Sessions Judge had not recorded the occupation of any of the witnesses, the 1st defendant testified that the driver of the second van was the priest himself and that all of them were going carolling. Surely credence must be given to the evidence of the priest at least to the fact that his van was there. There was no factual finding that the priest who took the oath to testify, had not told the truth. On this main issue the learned Sessions Judge had erred in finding that there was a lorry present. Besides, the defendants' half of the road measured 4 meters which is approximately about 13 1/2 feet wide. The 1st defendant said he was hardly about a 1' from the left edge of the road. The 2nd van driver testified that his van was 5' wide and that the 1st defendant's van was similar in width. Even assuming there was a lorry, there is no evidence, either of the size of the lorry nor how far it was travelling from its left edge of the road. Surely if the 1st defendant was about to overtake the lorry he must have encroached a substantial distance into the plaintiffs' path. But there is no such evidence. Only the front right side of the van had gone across the central double lines. The possibility of a lorry being present which the 1st defendant is alleged to have overtaken cannot be accepted.

The learned Sessions Judge held that the plaintiffs had no reason to encroach because there were no vehicles ahead of the motorcycles. She however failed to take into account the admission of the 1st plaintiff that he had to proceed nearer to the centre because he could not see those central lines if he had kept to the left ledge of the road. There is no logic in this statement. If he had only kept to the left edge of the road he need not worry even if he could not see the central lines because he would be travelling well within his safe area. Further his head lamp was weak and was not throwing the light far enough for him to see the road which according to him was dark. Riding a motocycle which gave insufficient light, it was all the more incumbent on the 1st plaintiff to have kept to the left edge of the road. Then again under such condition his speed was between 60-70 k.p.h. Surely it was his duty to ride at such a speed as would enable him to react to an emergency.

To my mind the learned Sessions Judge erred when she failed to give due weight to the mark "I" on the sketch denoted as "kesan tyre". The investigating officer testified that this was not a brake mark but a mark caused by the tyre after it had punctured. The 1st defendant testified that when he began his journey all his tyres were in good condition. There is evidence of an impact to the tyre and the tyre had been punctured. The photograph shows the drag

mark of the van due to the punctured tyre, for a distance of 8.40 meters. I am satisfied that the impact between the motorcycles and the van was at point "I" which is clearly into the 1st defendant's path. The failure of the learned Sessions Judge to consider this vital piece of evidence has resulted in miscarriage of justice to the defendants.

It is obvious that both the riders of the motorcycles had encroached into the 1st defendant's path. The 1st defendant too could not have been driving 1' from the left edge as he testified. He too must have been keeping more to the centre when the collision occurred. I thus found both the riders of the motorcycle and the 1st defendant equally liable. The pillion rider would no doubt succeed on a 100%. However I granted the defendants an order for indemnity with costs against the 1st plaintiff in respect of the 2nd plaintiff's claim. As to whether such an order can be executed as an indemnity or as a set off against the 1st plaintiff where the payment to the 1st plaintiff is made by the insurers of the defendants pursuant to compulsory insurance cover, is not for me to decide or to comment on at this stage.

Quantum

The defendants' appeal against quantum given in respect of the 1st plaintiff relates to loss of earnings and the award relating to the cost of prosthesis.

Loss of Earnings

There was evidence that the 1st plaintiff's last drawn income was RM1,321.25. After six months of the accident he tried to return to the same job where he worked, for two - three days. He was unable to continue as he had much standing to do at work. However his employers were good enough to pay him a salary for three months after the accident. He then worked in his uncle's store at the counter and was paid RM400 per month. The learned Sessions Judge took the earnings at an average of RM930. She rejected his claim to RM1,321.75 p.m. Since his salary was RM600 and as the balance constituted allowances she took an average allowance of RM300. She then awarded a sum of RM930 p.m. She therefore awarded RM930 for three months and for the balance 16 years she awarded at the rate of RM530 p.m. In respect of this Mr. Rajendran's complaint is that there ought to be a 1/3 deduction from the total award made for future loss based on the Court of Appeal's decision in *Takong Tabari v. Government of Sarawak & Ors and Another Appeal* [1998] 4 CLJ 589 which followed the decision of the Federal Court in *Chan Chin Ming & Anor v. Lim Yok Eng* [1994] 3 CLJ 687 which gave the Court the right to deduct a sum for contingencies and based on other vicissitudes of life and also taking into account the accelerated payment. Since it is open to each court to consider each case on its own special features when taking into account the principles of contingencies and other vicissitudes of life, and bound by the

decision of the Federal Court and the Court of Appeal on the application of the said principle, I find that there ought to be a deduction made. However since there was no basis nor explanation for a standard 1/3 deduction, I am of the view that I am not transgressing the principle of *stare decisis* if I exercise my discretion based on the background of the lives of the plaintiffs herein, and make a deduction of 1/4 of the total award made.

There was a cross appeal by the plaintiff that this award was too low. I allowed partially the appeal and awarded for three months actual loss at RM1,321.75. Applying the principle laid out in *Takong Tabari (supra)* I deducted 1/4 from the total award made for future cost of prosthesis.

In respect of the 2nd respondent's claim, the grandmother testified that the deceased pillion gave her RM500 p.m. The vouchers from the employer which were accepted showed his last drawn salary including overtime earnings and other allowances and after taking all deductions, as RM1,660.80. She testified that the whereabouts of the deceased's parents was unknown both to her and to the deceased. She had three children. The eldest had died. The second is working in Kuala Lumpur and does not support her at all and the third child is retarded and stays with her. Other than the said RM500 p.m. she has no other means of supporting herself and the retarded child. Whilst the question can arise as to whether the retarded son (the uncle) of the deceased could be termed a dependant under the Civil Law Act and capable of claiming support, the law must remain humane. It cannot be rigidly compartmentalised. It cannot be the law, that because some portion of the sum of RM500 would go to support her retarded son, such sum must be deducted. After all the RM500 is given to the grandmother for her to spend as she wishes. If she chooses to spend it on her dependant son, the law cannot penalise a mother for her love. The court however assessed the sum given to the mother at RM300 p.m. I rejected Mr. Rajendran's contention that a portion of the award in respect of the dependant uncle be deducted. The court awarded a 16 year purchase for the grandmother who was 66 years based on the pleadings, although again the learned Sessions Judge did not record the age of the grandmother when she gave evidence.

I set aside the award of RM300 and awarded RM500 p.m. but reduced the years of purchase to five years since the grandmother was already 66 years old.

The 3rd respondent was the father of the rider of the second motorcycle. Again his age has not been recorded; however by consent parties informed me that the deceased's father was born in 1955, thus making him 47. There is clear evidence that the deceased's last known salary was RM1,653.10. The father

testified that the deceased gave him RM800 p.m. out of which RM500 was for his use whereas the balance RM300 was for his wife. The court however found the father's income was RM600 p.m. and made an award of RM300 for the father with a purchase of 16 years. Mr. Rajendran suggested a sum of RM200 for ten years. Having considered the evidence I find that whatever the sum the son earned it is reasonable that he gave his father RM300 since the mother is not claiming as a dependant. It is inconceivable that since the father himself testified that he was earning only RM600 a month, that he would spend the RM500 that he said the son gave him "untuk beli pakaian, rokok and lain-lain." I accepted the award of RM300 made by the learned Sessions Judge but I reduced the years of purchase from 16 years to ten years which is reasonable considering the vicissitudes of life which would no doubt include the prospect of the deceased's son getting married in 10 years time.

In respect of costs, I found it fair to order each party to bear his/her own costs.